



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 777 OF 2010

IN THE MATTER OF THE ESTATE OF HELLEN WAMBUI KURIA

RULING

1. Samuel Kungu Kuria filed a grant Letter of Administration intestate of the estate of Hellen Wambui on the **22nd of April 2010**. In his affidavit in support of the petition he listed the following persons as those surviving the deceased ;

- i. Josephine Njoki Kagundadaughter
- ii. Njeri Cucu.....daughter
- iii. Hannah Wangui Machariadaughter
- iv. Esther Wanjiru Kimani.....wife of Joseph Macharia Kuria (deceased)
- v. Ruth Njeri Kuria.....daughter
- vi. Hosea Ndogo Kuria.....son
- vii. Samuel Kungu Kuria.....son
- viii. Benson Kamau Kuria.....son

2. On the 23rd of April 2014 the petitioner applied to have the letters of Administration confirmed. In his affidavit filed in support of the said application he list the persons who survived the deceased as; Samuel Kungu Kuria, Josephine Njoki Kagunda, Njeri Cucu, Hannah Wangui Macharia, Esther Wanjiru Kimani (wife of Joseph Macharia Kuria), Ruth Njeri Kuria, Hosea Ndogo Kuria and Benson Kamau Kuria. A schedule of distribution was also filed with the said application. The property listed was Githunguri/Kanja?979 approximately 10acres, those to inherit were, Njeri Cucu and Esther Wanjiru Kimani were to get 2 acres, the remaining of the beneficiaries Samuel Kungu Kuria, Josephine Njoki Kagunda, Hannah Wangui Macharia, Ruth Njeri Kuria, Hosea Ndogo Kuria and Benson Kamau Kuria, were to get one acre each.

3. On the 4th of June 2015 Esther Wanjiru Kimani filed an affidavit of protest claiming that she is one of the beneficiaries and the dependent of the deceased having been married to Benson Kamau Kuria who passed on the 12th of November 2013 stating that her brothers and sisters in law have deliberately omitted her name from cause with a view of disinheriting her. That her deceased husband and her were blessed with 4 children namely; Veronicah Njeri Kamau, Hellen Wambui Kamau, Antony Kuria, Kamau and Fredrick Kimani Kamau who are minors and also dependents.

4. Ruth Waruguru Kago also filed an affidavit of protest stating she was married to the Joseph Macharia Kuria deceased vide customary law and is not listed as a beneficiary in the cause. That the late Joseph Macharia Kuria passed on or about the year 1998, and she was left out of the cause deliberately by her brothers and sisters in law with a view of disinheriting her and having her evicted from the matrimonial home. That they were blessed with two children who are minors and also depend on the estate.

5. On the 23rd of March 2015 Ruth Waruguru Kago who claims to be the 2nd wife of the late Joseph Macharia filed a summons for dependent under **Sections 26 and 29** of the Law of Succession Act and **Rule 45 and 49** of the Probate and Administration rules seeking orders that;

*i. That no grant of representation to the estate of the above mentioned **Hellen Wambui Kuria** who died on 7th October 2005 should be made before adequate and reasonable provision is made for **Ruth Waruguru Kago** who is the 2nd wife of the late Joseph Macharia Kuria a dependent from the estate of the deceased.*

ii. That such adequate and reasonable provision be made for the applicant out of the net estate as the court deems fit.

iii. That costs of this application be provided for

6. The application is based on the following general ground;

a. That the applicant is the 2nd wife of the late Joseph Macharia Kuria who was the biological son of the deceased Hellen Wambui Kuria

b. That the applicant was supported by his late husband Joseph Macharia Kuria who is the biological son of the deceased Hellen Wambui Kuria and together with the late Joseph Macharia Kuria they have been blessed with two children.

c. That though the applicant's co-wife one Esther Wanjiru Kimani has been provided as one of the beneficiaries to the deceased estate the applicant has been completely omitted.

d. The applicant has alongside Esther Wanjiru Kimani been issued with a grant in respect to her late husband's estate.

7. Ruth in her supporting affidavit avers as follows; that she is the 2nd wife of the late Joseph Macharia Kuria who is the biological son of the deceased Hellen Wambui Kuria and her direct dependant and heir. That the deceased died intestate and a grant of representation was made by Samuel Kungu Kuria to which she has objected as she was left out as one of the beneficiaries of the deceased and the grant is yet to be confirmed. That her relationship with the deceased is through his son the late Joseph Macharia Kuria who was her husband alongside Esther Wanjiru Kimani who is her co-wife. That the deceased family has always been aware of the union between her and Joseph Macharia Kuria which union resulted to the siring of two children. That her late husband supported her through the deceased estate. She has already taken out a grant of representation in respect of her late husband's estate. That her children and herself have no one to turn and prays that this court makes adequate provision from the late mother in laws estate as her late husband was entitled to. That the property of the deceased at her time of death was Githunguri/Kanjai/979/Approximately 10 Acres but the liabilities were unknown. That as a wife to a child of the deceased she lies in priority alongside the deceased other siblings and should be equally provided for as she is eligible for adequate provision as both heir and dependent.

8. Esther Wanjiru Kimani filed a replying affidavit in response to the affidavit of Ruth that applicant. She depones that Ruth Waruguru Kago is her co-wife but upon the demise of their late husband Ruth went ahead and got letters of administration without involving her in Githunguri Succession Cause 48 of 1991. That Ruth misused the estate of the late Joseph Macharia Kuria alone without involving her, (she lists that said property). That Ruth should account for the proceeds acquired in the Githunguri Succession Cause

before benefiting from this succession cause. That after the demise of her husband Ruth got married to one Stephen Mathu Njuguna who is also deceased and that she is not entitled to benefit from the estate as an indirect beneficiary of Joseph Macharia Kuria. That under Section 35 (1) of the Law of Succession Act its provided that once a wife remarries she loses her interest in the estate of her deceased husband and that Ruth wants to benefit twice from two estates which is unlawful and unfair to the other beneficiaries. That she has lied to the court that she was a co-administrator of the estate of Joseph Kuria yet Ruth never involved her. That Ruth has come to court with tainted hands and has misled the court by withholding some truths and therefore should not be trusted and should be rebuked.

9. In a supplementary affidavit dated that 19/11/2015 Ruth Kago reiterates her earlier averments, denies that she took out the letters of administration on her own without involving Esther. She explains what happened to the property she is accused of misusing. That the estate of Joseph Macharia Kuria is different and distinct from that of Hellen Wambui Kuria and that Esther should seek redress in the Githunguri cause. That she was not married to Stephen Macharia Njuguna nor did she sire any children with him, that she had two with Joseph Kuria and the claim she makes is on her how behalf and on behalf of her children who are entitled to succeed their grandmothers estate through their father who since passed on. That Esther has not stated what she inherited from the late Stephen Mathu Njuguna and that she challenges her co-wife to show how she intermeddled with the estate of Joseph Macharia Kuria. That as wife of the children of the deceased she lies in priority alongside the deceased's other siblings and should be equally provided for as she is eligible for adequate provisions as both heir and dependent more so having sired children with the deceased's deceased son and heir to her estate.

10. Parties filed written submissions which I have read and considered together with law. From the submissions the two issues for determination are;

i. Is the respondent a beneficiary of the estate?

ii. Is Ruth Waruguru Kago trying to administer the estate of the deceased?

11. It was submitted that the applicant Esther Wanjiru challenges the Locus of the administrator Ruth Waruguru Kago to be a beneficiary of the Estate of Hellen Wambui Kuria who was their mother in law, claiming that Ruth has since remarried after the death of her husband and therefore does not fall within the meaning of a dependent as provided under. That Ruth married one Stephen Mathu Njuguna and that the fact that she has not provided evidence of the remarriage is solely because they cannot be any material evidence on customary marriage for which she was not invited or involved. On whether Ruth is qualified to be an administrator in the cause it is their submission that Ruth does not qualify to administrate/benefit from the estate since her integrity is questionable after having misappropriated /disinherited some beneficiaries in the estate of the late Joseph Macharia Kuria in an earlier succession cause no. 48 of 1991 where she was an administrator. Mr. Morara for the applicant relied on the case of *Benson Angolo Nasibi V. Rose Apwokan and another, and in the matter of the estate of Reuben Alumba Nasibi deceased succession cause 519 A of 2000.*

12. Mr. Makumi for Jane Nungari Ngang'a, Ruth Waruguru Kago, Hosea Ndogo Kuria and Esther Wanjiru Kimani who are beneficiaries submitted that from the competing versions of evidence Esther Wanjiru Macharia did not make out her case on a balance of probability that she should solely get two acres from the estate of Joseph Macharia Kuria. That Samuel Kung'u Kuria is the only administrator of Hellen Wambua Kuria whereas Ruth Kago and Esther Macharia are administrators of the estate of John Macharia Kuria. That Ruth has not sought to administer the estate of Hellen but to succeed it and Esther Macharia has not adduced evidence to show that Ruth Kago misappropriated the estate of Joseph Macharia. That the distribution of Joseph Macharia Kuria Estate is within a different cause and the same can only be handled in Githunguri Succession Cause No. 48 of 1991 Estate of John Macharia Kuria and as such is not an issue for the Court to determine. That Esther Wanjiru Kimani concedes that Ruth Waruguru Kago is her co-wife and bore two children with Joseph Macharia Kuria. That Esther Wanjiru Kimani did not lead any evidence proving that Ruth Waruguru Kago remarried one Stephen Mathu Njuguna, that such evidence if at all should have been, duration of cohabitation, place of cohabited, bearing of children and entailed extricate details of the particular customary marriage as supported by its

customs. On the issue of Ruth being entitled to inherit from the estate it was submitted that her application to be provided for has not been contested. The respondent relied on the provisions of section 26 and 29(b) of the Law of Succession Act and submitted that since the application was not opposed Ruth is entitled to succeed in the estate. She further relied on the provision of 71 of the Law of Succession Act Cap 160 which provides;

“.. In the case of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all the person beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares”.

13. Counsel submitted that since Ruth’s application dated 28th March, 2015 succeeds without being opposed thus identifying her identity; that the court cannot proceed to confirm the grant without identifying her respective share as provided under section 71 of the Law of Succession Act Cap 160. He went on further to distinguish the decision in the case of ***Benson Angolo Nasibi*** (Supra) as the administrators therein were not excused from administering but succeeding the estate. He further relied on the provisions of section 107 (1) and 107 (2) of the Evidence Act Cap 80 and stated that the proof or otherwise of customary marriage is not something that the court will take judicial notice of. It must be proved to the required standard. He relied on two cases namely; ***Nairobi HCCC NO 1290 of 2009 in the matter of the estate of Karanja Kigo (deceased)*** where Justice Muigai cited the essentials of valid marriage under Kikuyu customary law from the book Restatement of African Law; the law of Marriage and Divorce by Eugene Cotran Volume 1 Chapter 2 and the case of ***Pricilla Waruguru Gathigo Vs. Virginia Kanugu Gathigo (2004) ECLR in the matter of the estate of Joseph Gathigo Kabuito (deceased)*** where Justice Okwengu JJA Held;

“ ..I find that the evidence adduced by the protestor in proof of her alleged marriage to the deceased fell short of proving the alleged marriage... there were no other independent witness to the customary formalities there was no evidence that there was any Nguraria Ram Slaughtered nor was there any evidence that there were any elders from the deceased’s relatives who participated in the alleged formalities..”.

14. Having considered all that has been deponed and submitted I do agree that the two issues are;

i. Whether Ruth Waruguru Kago is a beneficiary of the estate of Hannah Wambui Kuria.

ii. Whether she is trying to administer the estate.

There is no dispute that Ruth Kago and Esther Kimani were co- wives and were marriage to the late John Macharia Kuria. Ruth claims that she is a beneficiary by virtue of being a dependant as provided under sections 29 of the Law of Succession Act. This Esther disputes claiming that Ruth remarried. As correctly submitted the provisions of section 107 (1) and 107 (2) on the Evidence Act Cap 80 apply for he who alleges a fact must prove it. Esther Kimani has merely stated that Ruth Kago remarried however she has not adduced any evidence of such marriage whether customary or statutory. I need not get into the essentials of what makes a valid marriage under Kikuyu Customary Law as there was no evidence adduced that she married under customary law. If indeed she was married this court expected Esther Kimani to tender evidence of either her co-habitation if the alleged Stephen Mathu Njuguna and details of the child its alleged was sired out of said marriage. Ruth Kago was a wife to John Macharia Kuria and being a widow just as Esther Kimani is, Ruth is also entitled to inherit as provided in Law under Section 29 of the Law of Succession Act from estate of the deceased. Ruth claims she was a dependant of the deceased and since her husband was the son of the deceased she falls within the category provided in Section 29 of Cap 160. **(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**

15. On the 2nd issue Ruth is not claiming to administer the estate. In her affidavits she claims to be a dependant being a second wife of Joseph Macharia and seeks to be adequately provided for from the estate of her mother in law whose estate her late husband was entitled to. This is what I find the administrator should do, to provide adequately for Ruth Kago being one of the beneficiaries of the estate

of Hellen Wambui Kuria. Parties shall proceed to have the grant confirmed after making adequate provision for all the beneficiaries Ruth Waruguru Kago inclusive in compliance with Section 71 of the Law of Succession. Esther Wanjiru Kimani should follow up her issues relating to her late husband's estate in Succession Cause No. 48 of 1999 filed at Githunguri court as it is a different cause from this one. This cause shall be mentioned within 60 days from the date of this ruling or earlier to confirm compliance. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered this 24th day of March 2016

R.E.OUGO

JUDGE

In the presence of;-

.....**For the Esther Wanjiru Kimani**

.....**For the Ruth Waruguru Kago**

.....**Charity Court Clerk**